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Abdul Razab bin Yahaya lwn Champsurf Sdn Bhd

B MAHKAMAH TINGGI (PULAU PINANG) — CIVIL APPEAL NO PA-16-5–12 OF 2020
ABD MAJID HAMZAH J
1 MAC 2022

C *Labour Law — Employment — Retrenchment — Claim for retrenchment benefits — Whether employee entitled to retrenchment benefits — Whether employee was manual worker or involved in supervision work — Whether company's employee handbook part of contract of service — Employment Act 1955 s 69(1)(a)*

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This was the appellant's appeal against the decision of the assistant director of labour ('ADL') in dismissing his claim for retrenchment benefits amounting to RM38,745.80. The appellant, a *chef de partie* was retrenched and was paid his April salary besides a month salary in lieu of one-month notice. The appellate thus proceeded to file his complaint pursuant to sub-s 69(1)(a) of the Employment Act 1955 ('Act 265') seeking for retrenchment benefit. The respondent took the position that the appellant was not entitled to such benefit as he was neither a manual worker nor a supervisor and his monthly salary exceeded RM2,000. The ADL found for the respondent and held that as the appellant's monthly salary exceeded RM2,000, the nature of his job must involve manual labour or supervising other employees engaging in manual labour in order to be protected under Act 265 as provided in the First Schedule. The ADL arrived at this conclusion based on the evidence of the respondent and appellant's admission during cross-examination that the appellant's task was more towards planning, monitoring and preparation of food. He did not supervise the chefs/cooks and commises. The appellant appealed against the decision of the ADL and submitted that the ADL misdirected herself when she read s 69A of Act 265 in isolation. Alternatively, the appellant's counsel submitted that the appellant was a supervisor and sub-para 2(3) of the First Schedule of Act 265 would apply.

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Held, allowing the appeal with costs:

I (1) It could not be said the appellant was not a manual worker or involved in supervising the junior cooks/chefs. Irrespective of the label attached to the appellant, the appellant was still a cook during his employment. No matter what grade, a cook had to learn to cook and the skill improved from experience and it remained a manual job. Therefore, the ADL had

misdirected herself when she found that the appellant was not a manual worker. There was also clear evidence that he supervised the demi chefs, commises and cooks (see para 12).

(2) The employee handbook was part and parcel of the contract of service. The appellant had to observe and adhere to the terms and conditions contained therein. The respondent could not argue that the exceptions included retrenchment. There was no ambiguity in sub-cl 1.13 (see para 13).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap keputusan penolong pengarah tenaga kerja ('ADL') yang yang menolak tuntutannya bagi faedah pemberhentian kerja berjumlah RM38,745.80. Perayu, seorang *chef de partie* telah diberhentikan kerja dan dibayar gaji untuk bulan April selain sebulan gaji sebagai ganti notis satu bulan. Sehubungan itu, perayu memfailkan aduan menurut sub-peraturan 69(1)(a) Akta Kerja 1955 ('Akta 265') untuk faedah pemberhentian kerja. Responden berhujah bahawa perayu tidak berhak mendapat faedah tersebut kerana beliau bukanlah pekerja manual ataupun penyelia dan gaji bulanannya melebihi RM2,000. ADL mendapati responden berpendapat bahawa memandangkan gaji bulanan perayu melebihi RM2,000, sifat pekerjaannya mesti melibatkan pekerja manual atau menyelia pekerja lain yang merupakan pekerja manual yang dilindungi di bawah Akta 265 seperti yang diperuntukkan di dalam Jadual Pertama. ADL membuat keputusan berdasarkan keterangan responden dan pengakuan perayu semasa pemeriksaan balas bahawa tugas perayu lebih kepada perancangan, pemantauan dan penyediaan makanan. Dia tidak menyelia chef/tukang masak dan komis-komis. Perayu merayu terhadap keputusan ADL tersebut dan menghujahkan bahawa ADL terkhilaf apabila dia membaca s 69A Akta 265 secara berasingan. Sebagai alternatif, peguam perayu menghujahkan bahawa perayu adalah penyelia dan sub-perenggan 2(3) Jadual Pertama Akta 265 adalah terpakai.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu tidak boleh dikatakan sebagai bukan pekerja manual atau terlibat dalam menyelia tukang masak/tukang masak junior. Tanpa mengira sebarang gelaran kepada perayu, perayu masih merupakan tukang masak semasa bekerja. Tanpa mengira gred, tukang masak perlu belajar memasak dan kemahirannya bertambah baik daripada pengalaman dan ianya tetap merupakan pekerjaan manual. Oleh itu, ADL telah terkhilaf apabila dia memutuskan bahawa perayu bukan pekerja manual. Terdapat juga bukti jelas bahawa beliau menyelia tukang masak demi, komis dan tukang-tukang masak lain (lihat perenggan 12).

(2) Buku panduan pekerja adalah sebahagian daripada kontrak

perkhidmatan. Perayu perlu mematuhi terma dan syarat yang terkandung di dalamnya. Responden tidak boleh berhujah bahawa pengecualian adalah termasuk pemberhentian kerja. Sub-klausa 1.13 adalah jelas (lihat perenggan 13).]

Cases referred to

Appeal of Gardner, Re Maschek, Re Tyrrell [1938] 1 All ER 20, KBD (refd)
Colgate Palmolive Sdn Bhd v Cheong Foo Weng [2001] MLJU 765; [2001] 7 MLRH 386, HC (refd)
Hemanbabu s/o Aplanayara v Admal Education Sdn Bhd [2019] MLJU 1674; [2019] 1 LNS 2016, HC (refd)
Jacques v Steam Tug Alexandra [1921] 2 AC 339, HL (refd)
Lee Loy & Ors v Poh Kam Sang & Anor [2018] 3 MLJ 240; [2017] 1 LNS 2023, CA (refd)
Poominathan a/l Kuppusamy v Besprin Stationers Sdn Bhd [2003] 3 MLJ 249; [2003] 3 CLJ 118, HC (refd)
Vengatasalam Chelappan v Federal Power Sdn Bhd [2019] 3 ILR 442 (refd)

Legislation referred to

Employment Act 1955 ss 2(1), 69(1)(a), 69A, 69B, First Schedule, paras 1, 2(1), (3)

(Presgrave & Matthews) bagi pihak perayu.
(BC Teh & Yeoh) bagi pihak responden.

Abd Majid Hamzah J:

[1] The appellant appealed against the decision of the Assistant Director of Labour ('ADL') Pulau Pinang dismissing his claim for retrenchment benefits amounting to RM38,745.80. Having heard the appeal, I allowed the said appeal with costs.

[2] On 30 April 2020 the appellant a *chef de partie* was retrenched and was paid his April salary besides a month salary in lieu of one-month notice. At the material time he earned a monthly salary of RM2,562. He filed his complaint pursuant to sub-s 69(1)(a) of the Employment Act 1955 ('Act 265') seeking for retrenchment benefit. The respondent took the position that the appellant was not entitled to such benefit as he was neither a manual worker nor a supervisor and his monthly salary exceeded RM2,000.

DECISION OF THE LABOUR COURT

[3] The learned ADL found for the respondent. She held that as the appellant's monthly salary exceeded RM2,000 the nature of his job must involve manual labour or supervising other employees engaging in manual

labour in order to be protected under Act 265 as provided in the First Schedule. She arrived at this conclusion, according to her, based on the evidence of the respondent and appellant's admission during cross-examination that the appellant's task was more towards planning, monitoring and preparation of food. He did not supervise the chefs/cooks and commises.

[4] The learned counsel for the appellant submitted that the learned ADL misdirected herself when she read s 69A of Act 265 in isolation. She pointed out s 69A must be read with s 69B. She further referred to the Employee Handbook ('Handbook') in particular sub-cll 1.13 and 1.15. It was her contention that the Handbook was part of the appellant's service contract. Clause 1.13 has provided for exceptions for payment of termination benefits which do not apply to the appellant. She further submitted that the respondent cannot blow hot and cold pertaining to compliance with the Handbook and at the same time arguing the said Handbook was not part of the contract. In her alternative argument the learned counsel submitted that the appellant was a supervisor and sub-para 2(3) of the First Schedule would apply. Among the authorities referred to were T Balasubramaniam, *A Practical Guide To The Employment Act 1955*, *Hemanbabu s/o Aplanayara v Admal Education Sdn Bhd* [2019] MLJU 1674; [2019] 1 LNS 2016, *Poominathan a/l Kuppusamy v Besprin Stationers Sdn Bhd* [2003] 3 MLJ 249; [2003] 3 CLJ 118, *Lee Loy & Ors v Poh Kam Sang & Anor* [2018] 3 MLJ 240; [2017] 1 LNS 2023 and *Vengatasalam Chelappan v Federal Power Sdn Bhd* [2019] 3 ILR 442.

[5] The learned counsel for the respondent submitted that the learned AOL was correct in finding that the appellant was not entitled to any retrenchment or termination benefits. He pointed out that the appellant was not an employee under Act 265 as para 1 of the First Schedule of Act 265 did not apply to him as the appellant earned more that RM2,000 per month. He further argued that sub-paras 2(1) and (3) have no application too as the appellant was not a manual worker nor involved in any supervision work and cited the case of *Colgate Palmolive Sdn Bhd v Cheong Foo Weng* [2001] MLJU 765; [2001] 7 MLRH 386 in support of his contention. As regards the Handbook the learned counsel submitted that the Handbook merely served as a guide for employees and has no legal standing. The Handbook itself provides that in the event of any legal dispute the parties should refer to Act 265.

ANALYSIS AND FINDINGS

[6] Subsection 2(1) of Act 265 defines employee as:

> 'employee' means any person or class of persons —
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> (a) included in any category in the First Schedule to the extent specified therein; or

(b) in respect of whom the Minister makes an order under subsection (3) or section 2A.

The First Schedule provides:

'Employee'

(1) Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed two thousand ringgit a month.

(2) Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which —

(1) he is engaged in manual labour including such Jabour as an artisan or apprentice:

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual Jabour unless the time during which he is required to perform manual Jabour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period;

(2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes.

(3) he supervises or oversees other employees engaged in manual Jabour employed by the same employer in and throughout the performance of their work;

(4) ...

(5) ...

[7] In order to decide whether the appellant is entitled to the retrenchment or termination benefits, the ADL must find whether he was an employee under Act 265. As the appellant's monthly salary exceeded RM2000 sub-para 1 does not apply to him. This is not disputed. The issue herein is whether he was engaged in manual labour or he supervised other employees engaged in manual labour.

[8] In *Colgate Palmolive* at p 387 (MLRH) Faiza Tamby Chik J held:

It is clear from the authorities on this point that the test postulated by the Courts to determine whether or not a person is 'engaged in manual labour' is as follows:

'what is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment?

Thus, it is essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. In law, a person is not deemed to be 'engaged in manual labour' if his job functions are primarily and

substantially dependent on his acquired skill, knowledge or experience but with incidental manual work. Conversely, a person is in law 'engaged in manual labour' if his duties are substantially or purely physical in nature with every little or no mental effort.

The learned judge referred to *Appeal of Gardner, Re Maschek, Re Tyrrell* [1938] 1 All ER 20 and *Jacques v Steam Tug Alexandra* [1921] 2 AC 339 where it was held that it was extremely unwise to rely on the job designation or the title of the job. But at the same time the authorities did say each case must be determined on its own set of facts.

[9] The appellant was a *chef de partie*. According to the respondent the demi (assistant) chefs, cooks and commises reported to the appellant being in the senior position. The job description are as follows:

A) PURPOSE

Responsible for food requirements for shift, planning. Preparation of food for Ala carte, buffet presentation and maintenance, monitoring food quality, supervision minimize food wastage, job rotation, safety, cleaning, products and service knowledge, communication skills and roster.

B) MAIN DUTIES AND RESPONSIBILITIES

1. To be on duty as assigned on the duty roster.
2. Assist planning food items for guests and employees.
3. Brief night chefs on food preparation requirements for next shift.
4. Prepare hot and cold food items in appropriate quantities for use in the next shift.
5. Prepare hot and cold items using the standard recipes and prepare food and buffet.
6. Ensure there is a sufficient supply of food for replenishing buffet.
7. Ensure that food is prepare in high quality.
8. Coordinated and supervise duties performed by commis chef and apprentice chef until they are sufficiently competent.
9. Control use of raw meat/storage area.
10. Assists is preparing spoilage reports and after kitchen transfer.

C) GENERAL DUTIES AND RESPONSIBILITIES

1. Work on a rotating basis in different sections kitchen operation including breeze kitchen, pastry, cold kitchen, malay kitchen and banquet kitchen.
2. Demonstrate compliance with health and safety requirements in the work space.
3. Implements procedures for security and emergency incidents.

4. Ensure all equipment is functioning and serviced regularly.
5. Ensure a high level of cleaning is maintained throughout the property.
6. Prepare and distribute duty roster.
7. Ensure time sheets are completed and handed in on time.'.

[10] The appellant told the court below that he was assigned to the 'Malay Kitchen' with his assistant where for the last three years besides cooking he had to take the raw materials from the suppliers. Both of them had to clean the raw materials and did the cooking owing to lack of staff. During cross-examination he did not deny that he coordinated and supervised the commis and apprentice chefs. He also admitted that his scope of work involved planning too. He did not deny when it was put to him that the cooks and commises involved manual work. His evidence in respect of cleaning the raw materials and cooking was not challenged by the respondent. The learned AOL in fact subsequently put the following question to him:

S: Setuju atau tidak selain dari masak, cuci bahan mentah anda ada buat repot?

J: Ya.

[11] There was no evidence to suggest that cleaning and cooking are not manually done. The respondent when asked to describe the job performed by the appellant, he testified:

S: Sila terangkan kepada mahkamah deksripsi tugas pengadu.

J: Position sebagai CDP responsible untuk food requirement for the shift iaitu planning, preparation. CDP dapat arahan dari Executive Chef menu akan diguna pakai untuk group ini. So CDP akan order buka PO untuk order ikut market list. Dia akan tengok berapa orang untuk group, tengok bahan mentah yang perlu order. CDP akan buat permintaan kepada Executive Chef. Kalau ada stok sedia CDP akan pastikan apa bahan mentah yang ada kalau ada keperluan tukar menu. ltu dimaksudkan preparation part. Planning pula ialah plan berapa cook dan commis yang perlu untuk memasak buffet untuk group. Dia akan buat permintaan daripada group untuk penyediaan makanan. Dia juga responsible untuk bila ada bahan mentah menu, menu slip, cook telah sedia ada, pastikan equipment sempurna macam dapur kalau gas tidak ada buat permintaan untuk repair dan tukar. Bab masak bila cook sedang masak dia dan assistant pastikan standard dan tempoh masa untuk masak dan hidang ikut timing yang ditetapkan. CDP pastikan · pengurangan food wastage. Dia akan kira untuk 200 orang berapa bahan mentah yang diperlukan untuk avoid wastage. Once food prepared, dia akan arah stewart atau cleaner untuk membersihkan tempat masak. Lepas itu, CDP buat pemantaun di function sama ada makanan perlu ditambah. Laporan pula berkaitan defeat equipment, keluarkan PO dalam bahagian dia, displinary issue. Contoh, ada group cook sedang masak perkara tidak patut berlaku kena buat laporan kepada ketua jabatan. Wastage kalau ada banyak pembaziran makanan semasa masak dia kena laporkan kepada ketua jabatan.

[12] I cannot see how it can be said that the appellant was not a manual worker or involved in supervising the junior cooks/chefs. Based on the totality of the evidence, I have no doubt that irrespective of the label attached to him, the appellant was still a cook during his employment. To · my mind, no matter what grade, a cook has to learn to cook and the skill improves from experience and it remains a manual job. I find that the learned AOL had misdirected herself when she found that the appellant was not a manual worker. There was also clear evidence that he supervised the demi chefs, commises and cooks. The learned AOL had also misdirected herself on this point when she concluded that sub-paras 1(2) and (3) have no application.

[13] As regards the Handbook I am of considered view that it is part and parcel of the contract of service. The appellant had to observe and adhere to the terms and conditions contained therein. They applied to him as well as to the other employees. Clause 1.13 provides:

> TERMINATION OR LAY-OFF BENEFITS
>
> The company is not liable to pay any termination or lay-off benefits under the following categories of termination of services:
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> (a) upon attaining the age of retirement at sixty (60).
>
> (b) dismissal as a result of misconduct after due inquiry.
>
> (c) voluntary termination of service for personal reason.
>
> (d) renewal of contract of service, or re-engagement under a new contract of service.

Notwithstanding sub-cl 1.15 which provides that the parties should resort to Act 265 when there is any legal dispute, I do not think the respondent can argue that the exceptions include retrenchment. There is no ambiguity in sub-cl 1.13. And I do not think the respondent's argument that the terms and conditions in the Handbook applied to him except sub-cl 1.13. That is a contradiction in terms.

[14] Based on the reasons discussed above the appeal is allowed with costs.

Appeal allowed with costs.

Reported by K Selvaraju